WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
SEPTEMBER, 2012

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol.

This calendar includes cases that originated in the following counties:

Dane
Juneau
Milwaukee
Rock
Waukesha

WEDNESDAY, SEPTEMBER 5, 2012

9:45 a.m. -	10AP2313	Juneau County Star-Times v. Juneau County
10:45 a.m.-	08AP1523	Rock-Koshkonong Lake District, et al. v. DNR, et al.

THURSDAY, SEPTEMBER 6, 2012

9:45 a.m. -	{07AP221	Bostco LLC v. Milwaukee Metropolitan Sewerage District
10:45 a.m.-	{07AP1440	Bostco LLC v. Milwaukee Metropolitan Sewerage District
	11AP1030-CR	State v. Gerald D. Taylor
1:30 p.m. -	10AP1366-CR	State v. James G. Brereton

FRIDAY, SEPTEMBER 7, 2012

9:45 a.m. -	11AP277-D	Office of Lawyer Regulation v. Nikola P. Kostich
10:45 a.m.-	11AP1240	Patricia A. Johnson v. Michael R. Masters
1:30 p.m. -	{11AP825	Dane County Department of Human Services v. Mable K.
	{11AP826	Dane County Department of Human Services v. Mable K.

In addition to the cases listed above, the following case will be decided by the court based upon the submission of briefs without oral argument:

2010AP2525-D - Office of Lawyer Regulation v. Vladimir M. Gorokhovsky

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Radio and TV, and print media wanting to take photographs, must make media requests 72 hours in advance by calling Supreme Court Media Coordinator Rick Blum at 608-271-4321. Summaries provided are not complete analyses of the issues presented.

(Rev. 8/29/12)

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 5, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed a Juneau County Circuit Court decision, Judge Charles A. Pollex, presiding.

2010AP2313 Juneau Co. Star-Times v. Juneau Co.

This open records case examines whether copies of certain legal bills requested of Juneau County and its clerk by the *Juneau County Star-Times* newspaper are subject to disclosure under the Wisconsin Open Records Law.

Some background: Juneau County was insured by Wisconsin County Mutual Insurance Corporation (WCMIC) under a public entity liability policy. The insurance policy provides that WCMIC shall pay sums that the county becomes legally obligated to pay as damages as a result of a covered occurrence and shall also pay attorney fees and related costs in defending against such a claim. The insurance policy gives WCMIC the right to investigate any occurrence and settle any claim or suit that may result even if the settlement amount is exclusively within the insurance deductible.

As pertinent to this action, WCMIC retained the Crivello Carlson law firm in October of 2008 to represent Juneau County Sheriff Brent Oleson in an administrative matter involving disciplinary proceedings the sheriff had commenced against Deputy Sheriff Jeremy Haske. WCMIC later retained the law firm to represent the county in two lawsuits filed by Haske against Juneau County and Sheriff Oleson.

Crivello Carlson sent all legal bills for its work on the Haske matters directly to WCMIC. Crivello Carlson did not send the legal bills to the county. The first time the county received copies of legal bills from Crivello Carlson was through a Feb. 10, 2010 letter from Crivello attorney Michele Ford to *Star-Times* reporter Peter Rebhahn in response to a Public Records request.

On Feb. 7, 2010 Rebhahn wrote to the Juneau County clerk requesting "access to bills submitted for payment to Juneau County's insurer, Wisconsin County Mutual Insurance Corp., by Atty. Michele Ford, or submitted by her law firm, Crivello Carlson, for services Ford rendered as counsel to Juneau County Sheriff Brent Oleson in the years 2008, 2009 and 2010." Ford, on behalf of the county, provided redacted versions of the legal bills to Rebhahn on Feb. 10, 2010. The redacted bills showed amounts billed to WCMIC by Crivello Carlson.

On February 16, 2010, the Star-Times asked for access to versions of the bills without redaction. The clerk responded on Feb. 17, indicating that the Feb. 10 letter and enclosures from Ford were intended to be the response from the county to Rebhahn's request.

The *Star-Times* filed an action for mandamus and declaratory relief against the county seeking disclosure of the redacted portions of the legal bills. The county filed an answer denying all claims. The parties filed cross-motions for summary judgment. The circuit court granted the county's motion for summary judgment. The circuit court concluded that the legal bills were not "records" under § 19.32(2) because they were not created or kept by the county; the legal bills were not contractors' records under § 19.36(3) because the bills concerned a private matter between WCMIC and Crivello Carlson and any connection between the legal bills and the

county's insurance policy with WCMIC was tenuous at best; the county did not waive its right to argue that the legal bills were not records or contractors' records subject to disclosure under the Public Records Law; and assuming, arguendo, that the legal bills were records or contractors' records, the county properly refused to disclose the redacted portions on the basis of attorney-client privilege.

The Star-Times appealed, and the Court of Appeals reversed the circuit court judgment and remanded with directions for the circuit court to order the county to make unredacted copies of the invoices available.

The county asserts that the Court of Appeals' decision has extended the contractors' records provision in the Open Records Law far beyond records produced or collected under a contract with a municipality. The county says the contract to which it is a party is the insurance policy, and it is not a party to the contractual relationship between WCMIC and Crivello Carlson.

The *Star-Times* says the insurance contract did not specify that the county was in any way prohibited from obtaining attorney billing invoices related to covered claims and there was no written contract between Crivello Carlson and WCMIC. The *Star-Times* contends that records produced or collected under a contract entered into by an authority subject to the Open Records Law must be made available for inspection and copying to the same extent as if the record were maintained by the authority.

WISCONSIN SUPREME COURT
WEDNESDAY, SEPTEMBER 5, 2012
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which affirmed a Rock County Circuit Court decision, Judge Daniel T. Dillon, presiding.

2008AP1523 Rock-Koshkonong Lake Dist. v. DNR

This case, which the Supreme Court previously denied certification, involves a Wisconsin Department of Natural Resources (DNR) order rejecting a petition to raise the water levels of Lake Koshkonong. The Supreme Court examines the scope and authority of the DNR to protect property and public rights in navigable waters under Wis. Stat. § 31.02(1)and Wis. Admin. Code § NR 103.

Some background: Lake Koshkonong, a very shallow lake, has approximately 27 miles of shoreline and 3,080 to 4,000 acres of wetlands in and around the lake. About 10 miles of shoreline is developed predominantly for residential use with some commercial use. Approximately 12.4 miles is undeveloped wetland shoreline.

In the mid-1800s, the Wisconsin Territorial Legislature and afterward the state Legislature, authorized construction of a dam at the present site of the Indianford Dam, located on the Rock River, which affects the water levels on the Rock River, Lake Koshkonong, and their tributaries. The DNR regulates the operation of the dam pursuant to Wis. Stat. ch. 31 through orders to owners of dams.

On April 21, 2003, the Rock-Koshkonong Lake District (District), a public inland lake protection and rehabilitation district established pursuant to Wis. Stat. ch. 33, filed a petition with the DNR requesting amendment of a 1991 water level order to allow increased water levels throughout the year and to eliminate the ordered "winter drawdown." A majority of residential and business riparian owners on Lake Koshkonong had supported the District's petition.

On April 15, 2005, the DNR issued a decision relating to the operation of the dam affecting water levels upstream on the Rock River and on Lake Koshkonong. The District petitioned the DNR for a contested case hearing, along with the Rock River Koshkonong Association, Inc., and the Lake Koshkonong Recreation Association, Inc.

The Division of Hearings and Appeals held the contested case hearing, and after post-hearing briefing, the administrative law judge (ALJ) issued a decision on Dec. 1, 2006, denying the petition. The ALJ sustained the DNR's order maintaining the summer water levels in the 1991 DNR order and raising the winter drawdown level by six inches. The decision was subsequently affirmed by the Rock County Circuit Court and Court of Appeals.

The ALJ found that Lake Koshkonong is an impaired water body under § 303(d) of the Clean Water Act, due in part to phosphorus and sediment pollutants, sedimentation, and loss of habitat. An increase in water level would likely affect wetlands and cause increased sedimentation, contrary to the Clean Water Act's goal of removing impairments in bodies of water listed as impaired.

The ALJ took into account the riparian owners' diminished ease of access to the water, which resulted in the diminished utility of the riparian rights and enjoyment of their property,

thus reducing the value of that property to them. Citing Wisconsin's Environmental Decade, Inc. v. DNR, 115 Wis. 2d 381, 340 N.W.2d 722 (1983), the ALJ concluded, however, that indirect economic impacts do not bear on the statutory standard set forth in sec 31.02(1).

The District asks the Supreme Court to review:

- if the DNR misconstrued the term "protect property" in setting water levels pursuant to Wis. Stat. § 31.02(1), by ignoring economic effects on property interests, such as residential values, business income, and public revenue.
- if the DNR exceeded the scope of its authority to protect "public rights in navigable waters" under § 31.02(1), by considering the effects of the water level order on private wetlands located above the ordinary high water mark?
- if the DNR exceeded the scope of its authority by applying Wis. Admin. Code § NR 103 to a water level proceeding under ch. 31?
- what level of deference, if any, should be accorded the DNR's interpretation and application of § 31.02(1)?

The state argues that the Court of Appeals applied plain statutory language and well-established case law. It says the legislature does not intend the DNR to evaluate economic impact when it did not explicitly or even implicitly provide in § 31.02(1) that the DNR was required to do so. It points out that no case has interpreted the plain language to include that requirement confirms that the District seeks a change that only the legislature can make.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 6, 2012
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed in part and reversed in part a Milwaukee County Circuit Court decision, Judge Jeffrey A. Kremers and Judge Jean A. Di Motto, presiding.

2007AP221/1440 Bostco v. Milwaukee Metro

This case involves allegations of negligent maintenance and operation of the Deep Tunnel, a massive underground sewage and storm water tunnel operated by the Milwaukee Metropolitan Sewerage District. At the request of both parties, the Supreme Court reviews issues related to, among other things, claims for damages and relief under Wis. Stat. § 893.80.

Some background: The Court of Appeals affirmed in part, and reversed in part, a judgment awarding damages and injunctive relief against the District and to the owners of the Boston Store building in downtown Milwaukee, Bostco LLC and Parisian, Inc., (collectively, Bostco).

Bostco claimed that the store's wooden foundation pilings were damaged as a result of groundwater seeping away from underneath its property and into the Deep Tunnel, a portion of which is located 160 feet east of Bostco's property. Bostco alleged the water table dropped, the soil settled, and the timber pilings were exposed to air, causing them to shift and rot, resulting in millions of dollars in damages. A notice of claim was served on the District.

The District asserted that since the 1950s, the pilings were decaying and 72 of 169 columns were repaired before the tunnel was constructed and 11 were repaired twice. It argued its state Department of Natural Resources permit requires the tunnel have a positive inward gradient to prevent wastewater ex-filtration.

The circuit court entered summary judgment dismissing Bostco's inverse condemnation claim and rejected the District's § 893.80(4) immunity defense. The circuit court concluded that § 893.80(4) immunizes municipalities from suits relating to design, but left them open to suit for negligent maintenance or operation of public works where a breach of a ministerial duty is alleged. See Milwaukee Metro Sewer District v. City of Milwaukee**,** 2005 WI 8, ¶60, 227 Wis. 2d 635, 691 N.W.2d 658 (MMSD).

Bostco proceeded to trial on July 11, 2006, on negligence and nuisance claims. It prevailed only on negligence. On July 27, 2006, the jury returned a verdict awarding Bostco $6.3 million in past and future damages (i.e., $9 million verdict, minus the 30-percent contributory negligence finding as to Bostco). Bostco's nuisance claim was defeated because the jury found Bostco failed to prove "significant harm," despite its finding that Bostco suffered $2.1 million in past damages attributable to the district.

Both parties filed and/or re-filed a series of post-verdict motions, which were considered over time by two different Milwaukee County Circuit Court judges due to judicial rotation.

On Sept. 11, 2006, Judge Jeffrey A. Kremers ruled, among other things, that the District's post-verdict motion should be granted to reduce the damages to $100,000 (i.e., $50,000 for Bostco and $50,000 for Parisian) pursuant to § 893.80(3), which caps damages on municipal liability for tort claims.

After post-verdict motions, Bostco argued the jury found the District had negligently caused it harm, and the evidence demonstrated that if portions of the Deep Tunnel one-half mile north and one-half mile south of the Boston Store were not lined with concrete, the timber piles would continue to be harmed. Bostco claimed that after the trial court imposed the cap on damages, it had no adequate remedy at law.

Ultimately circuit court Judge Jean W. Di Motto ordered that the District was required to install a concrete liner in that portion of the Deep Tunnel one-half mile north and one-half mile south of the downtown Boston Store, at an estimated cost of $10 million. She appointed a special master to oversee implementation of the injunctive relief. The order, later stayed, directed the special master to oversee issues involved in lining the tunnel. The case was appealed.

The Court of Appeals rejected the District's argument that it was immune from liability for not installing a concrete liner in the portion of the tunnel located near the Boston Store, once the District had notice of the dewatering of the aquifer. However, it overturned the injunction as contrary to § 893.80. Also, while it held as a matter of law that Bostco prevailed on its nuisance claim, it concluded the circuit court properly applied the § 893.80(3) damage cap. It further rejected the District's claim that Bostco's notice of claim failed to substantially comply with § 893.80(1).

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 6, 2012
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District IV (headquartered in Madison). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Outagamie County Circuit Court, Judge Dee R. Dyer, presiding.

2011AP1030-CR State v. Taylor

This certification examines whether the trial court properly employed the harmless error doctrine to deny the defendant's plea withdrawal motion without a hearing. More specifically, the District IV Court of Appeals asks the Supreme Court to resolve a potential conflict between the holdings in State v. Brown, 2006 WI 100, 293 Wis. 2d 594, 716 N.W.2d 906 and State v. Cross, 2010 WI 70, 326 Wis. 2d 492, 786 N.W.2d 64.

Some background: Gerald Taylor was charged with one count of uttering a forgery, as a repeat offender. Uttering a forgery is a Class H felony, punishable by up to three years of initial confinement and three years of extended supervision. The repeater allegation increases the potential initial confinement to five years.

Taylor pled no contest to the charge, in exchange for the state's recommendation of probation. At the plea hearing, the trial court misinformed the defendant that the maximum sentence was six years rather than eight. The court ultimately sentenced the defendant to three years of initial confinement and three years of extended supervision. The defendant filed a post-conviction motion seeking plea withdrawal, and he requested an evidentiary hearing.

Taylor argued he was entitled to plea withdrawal because the trial court misinformed him about the maximum sentence he faced with a repeater allegation. The circuit court denied the motion without an evidentiary hearing, concluding, as the state contends, that because the actual sentence imposed did not exceed the erroneous maximum, any error was harmless.

Taylor appealed, pointing out the potential conflict between Brown and Cross.

In its certification memo, District IV notes that State v. Bangert, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) held that when a defendant makes a prima facie showing that the court failed to comply with § 971.08(1), Stats., or some other mandated duty to provide the defendant with information necessary to evaluate whether to enter a plea, and the defendant also alleges a failure to understand the information that should have been provided, the defendant is entitled to an evidentiary hearing at which the state has the burden of showing that the plea was in fact entered knowingly, voluntarily, and intelligently. District IV notes that Brown and Cross address the application of Bangert to cases where a defendant claimed to have been misinformed about the potential penalty.

District IV says that following either Brown or Cross here could arguably lead to different results. It notes that as in Brown, this defendant was told he faced a lesser punishment than the law actually provided, but the sentence that was imposed did not exceed the amount of time the trial court had erroneously informed the defendant he was facing.

In contrast, District IV says the Cross court's discussion seems to suggest that the due process concerns implicated whenever a defendant has erroneously been informed that the penalty is less than the actual maximum might require a hearing to determine whether the defendant was aware of the actual penalty he faced.

District IV says assuming the harmless error doctrine can properly be applied to a plea withdrawal motion before holding an evidentiary hearing, the question then becomes whether the failure to advise the defendant about a charged penalty enhancer constitutes a Bangert violation and, if so, whether that error becomes harmless if the trial court does not actually impose an enhanced sentence.

A decision by the Supreme Court could harmonize the law in this area.

WISCONSIN SUPREME COURT
THURSDAY, SEPTEMBER 6, 2012
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Walworth County Circuit Court decision, Judge Michael S. Gibbs, presiding.

2010AP1366-CR State v. Brereton

This case examines whether a defendant's constitutional right to be free from unreasonable searches and seizures was violated when police seized his vehicle and covertly installed a sophisticated real-time GPS tracking device.

Some background: There were a string of burglaries in the border areas of Rock and Walworth counties in the fall of 2007. On Oct. 5, 2007, the police stopped a Pontiac that had reportedly been seen in the area around the time of some of the burglaries. The police later admitted that the reason for the stop was a pretext because police had decided to place a GPS monitoring device on the vehicle.

During the stop the police discovered that the two individuals in the car (one of whom was James G. Brereton) both had revoked drivers' licenses and that the license plates on the car had been issued for a different vehicle. The police transported Brereton and the other occupant away from the vehicle for a time, and surreptitiously towed the vehicle to a police impound lot.

After the vehicle had been moved, the police applied for a warrant to place a GPS unit in the vehicle. Based on an affidavit signed by a detective, Walworth County Circuit Court Judge James L. Carlson granted the application and issued a warrant/order authorizing the Walworth County Sheriff's Department "to place an electronic tracking device" on the Pontiac and to enter and re-enter the vehicle or any building containing the vehicle to install, use, or maintain the device or to monitor the location and movement of the target vehicle.

The warrant/order further authorized the sheriff's department "to obtain and use keys to operate and move the vehicle for the required time to a concealed location and . . . to open the engine compartments and trunk areas of the vehicles to install the devices."

The police entered the interior of the vehicle in order to activate the hood release lever and placed the advanced GPS-tracking device inside the engine compartment. After the vehicle was returned to its original location, the police brought back the two occupants, who were not advised that the vehicle had ever been moved or the tracking device installed.

Four days after the device had been attached to the Pontiac, the police determined that the Pontiac had been near the site of a reported burglary. They later stopped the vehicle and arrested the occupants, including Brereton, on suspicion of engaging in burglary and found evidence from a home that had been burgled.

Brereton moved to suppress the evidence obtained as a result of the use of the GPS tracking device. The circuit court denied the motion. Brereton subsequently pled guilty to five counts of burglary and later appealed.

The Court of Appeals concluded that the warrant had been validly issued, and that the police had probable cause to believe that the Pontiac was evidence of a crime or contained evidence of a crime when police seized and "searched" it.

Brereton asserts that the police acted unreasonably in executing the warrant because the device they used exceeded the scope of the warrant application and the warrant itself. Brereton emphasizes that the court's order stated in several places that it was based upon the detective's affidavit, which described a GPS device that did not provide real-time data.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 7, 2012
9:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in Milwaukee.

2011AP277-D Office of Lawyer Regulation v. Nikola P. Kostich

In this case, attorney Nikola Kostich has appealed the referee's recommendation that his license to practice law in Wisconsin be suspended for 60 days for three counts of professional misconduct.

Kostich has been licensed to practice law in Wisconsin since 1970 and practices in Milwaukee. Kostich has received three prior public reprimands for professional misconduct:

- In 1986 he was reprimanded on the basis of a criminal conviction for failing to file a tax return;
- In 2005 he was reprimanded for failing to determine if a client had grounds for an appeal for over 30 months after being retained; failing to respond to the client's letters and phone calls; failing to refund an advance payment of fees upon termination by the client; and failing to cooperate with an OLR investigation;
- In 2010 Attorney Kostich was reprimanded for representing an individual on criminal charges in which he had previously consulted with the victim in the criminal case about a potential civil action against the person he ultimately represented in the criminal matter.

The misconduct alleged in the OLR's complaint arose out of his representation of L. P., who was indicted in August 2006 on federal charges pertaining to distribution of crack cocaine. L.P. hired Kostich to defend her in August 2006 and paid him a $4,000 retainer. Between August 2006 and November 2008 L.P. and Kostich had various communications, either in person or by telephone, regarding possible plea agreements. L.P. did not want to enter a plea to any sort of drug trafficking charge and hoped to be able to plead to a misdemeanor rather than a felony.

In late 2008, Kostich experienced serious health issues that resulted in his absence from his law office from mid-November 2008 until early February 2009. He had lost his secretary a few months earlier and during his absence his daughter came in to serve as a part-time paralegal/secretary. Kostich said he instructed his daughter to tell clients who called that he was out of the office and would not be back for several months. L.P. said that between November 2008 and February 2009 she tried to contact Kostich approximately 50 times but he never responded and Kostich's daughter never said that he was experiencing serious medical problems or that he was going to be out of the office. L.P.'s mother also said she tried to contact Kostich approximately 15 times and also got no response.

In February 2009 L.P. said she wanted to terminate Kostich's representation and asked for a partial refund of the retainer paid. Kostich formally withdrew as L.P.'s counsel in early March

2009. L.P. then secured the services of a public defender and entered a plea to the lowest felony charge available. Kostich did not refund any portion of the $4,000 retainer and claimed he had earned all of it.

The OLR's complaint alleged that Kostich failed to keep L.P. reasonably informed about the status of her case, failed to promptly comply with reasonable requests for information, failed to promptly respond to L.P.'s request for information concerning fees and expenses, and failed to withdraw from representation when discharged by L.P.

The referee found that the OLR met its burden of proof as to all counts of misconduct. The referee recommended that Kostich's license be suspended for sixty days and that he be required to pay the costs of the proceeding. The referee noted that Wisconsin adheres to a system of progressive discipline, and Kostich has been the subject of three prior public reprimands. Kostich has appealed, arguing that two of the counts of misconduct are multiplicitous and that he should receive a fourth public reprimand rather than a 60-day suspension.

The Supreme Court is expected to decide whether Kostich engaged in misconduct and, if so, the appropriate sanction.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 7, 2012
10:45 a.m.

This is a certification from the Wisconsin Court of Appeals, District II (headquartered in Waukesha). The Court of Appeals may certify cases that it believes cannot be resolved by applying current Wisconsin law. The Wisconsin Supreme Court, as the state's preeminent law-developing court, often accepts such certifications from the Court of Appeals. This case originated in Waukesha County Circuit Court, Judge Kathryn W. Foster, presiding.

2011AP1240 Johnson v. Masters

This certification, arising from a divorce judgment entered more than 20 years ago, examines Wis. Stat. § 893.40, the "statute of repose."

More specifically, the Court of Appeals has asked the Supreme Court: When a wife seeks to obtain a pension award by submitting a qualified domestic relations order (QDRO) as required by the divorce judgment, and the submission is approximately one year after the former husband retires, but more than twenty years after the divorce judgment, is this an "action" which is barred by the statute of repose, Wis. Stat. § 893.40?

Some background: Patricia Johnson and Michael Masters initiated divorce proceedings in 1989. They entered into a marital settlement agreement that awarded to Johnson one-half of Masters' pension (valued up to the date of the divorce judgment). The agreement further stated that "[a] QDRO shall be submitted to secure these rights."

At the time the divorce judgment was entered in July 1989, the Wisconsin Retirement System (WRS), which administered Masters' pension, did not recognize QDROs. No QDRO was submitted at the time of the divorce, or for many years thereafter.

Masters retired in 2009. On March 5, 2010, Johnson submitted a QDRO to the circuit court – 20 years and seven months after the date of the divorce judgment. Masters objected and sought to dismiss Johnson's motion as being barred by the 20-year statute of repose.

The circuit court granted the motion to dismiss. Relying on Hamilton v. Hamilton, 2003 WI 50, 261 Wis. 2d 458, 661 N.W.2d 832, it concluded that the submission of the QDRO was an action to enforce the 1989 divorce judgment that was filed more and 20 years after the entry of the judgment. It construed Johnson's argument as being that the right to a QDRO had not accrued until Masters had retired and rejected that argument based on the statement in Hamilton that statutes of repose apply regardless of when a cause of action has accrued.

In certifying the case, the Court of Appeals identifies five "concerns" or issues regarding whether Hamilton truly should apply to the present case:

- Whether the submission of the QDRO constituted an "action" on the divorce judgment under the language of Wis. Stat. § 893.40 since it did not involve the filing of a summons and complaint.
- Whether Hamilton should apply here because that case involved a third party (the state of Wisconsin) filing an action to collect child support arrearages, while the present matter involves the same two parties and the same divorce proceeding.

- Whether the statement in Hamilton about statutes of repose not depending on the accrual of causes of action applies to the vesting of Johnson's right to a portion of Masters' pension, especially when the WRS did not accept QDROs at the time the divorce judgment was entered.
- Whether Hamilton can be applied to this case consistent with Wis. Stat. § 753.03, which provides that the circuit courts of this state have the power to issue writs or orders necessary to carry their judgments into effect.
- Whether Johnson's attempt to collect on that part of the pension is really an "action" on the divorce judgment and whether Masters has standing to object to Johnson's attempt to collect on the property interest that was legally conferred on her.

WISCONSIN SUPREME COURT
FRIDAY, SEPTEMBER 7, 2012
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reviewed a Dane County Circuit Court decision, Judge Amy Smith, presiding.

2011AP825/2011AP826 Dane Co. Dept. of Human Services v. Mable K.

This procedurally complex case examines the appeals process and rules of civil procedure involved when parental rights are terminated. The Supreme Court is asked to review whether a parent should be allowed to appeal a circuit court order entered on remand that denied, in part, a request for a new trial.

Some background: Mable K. has an IQ of 60. She is the mother of Isaiah H. and May K. Dane County first took custody of Isaiah on Jan. 24, 2007 when Mable was taken into custody on a probation hold. The county took custody of May directly from the hospital after her birth on Nov. 13, 2008. The court entered a dispositional order placing the children outside the home on June 24, 2009.

On March 24, 2010, the county filed the termination-of-parental-rights (TPR) petitions at issue here. As grounds for termination, the County alleged both abandonment and continuing need of protections or services pursuant to Wis. Stat. §§ 48.415(1) and (2). On May 24, 2010, the circuit court issued an order compelling Mable K.'s personal appearance at all court hearings. Her counsel apparently did not object to this order and did not discuss the implications of this order with her client.

Mable K.'s parental rights to both children were terminated following a partial trial and a default finding on Jan. 3, 2011. Mable K. appeared at the jury draw and on the first day of trial, but she did not show up the second day until 10 minutes after the court found her to be in default.

The circuit court stated that it found no reason to vacate the default finding.

Mable K. appealed, and on May 18, 2011, Mable K.'s appellate counsel moved the Court of Appeals to remand for a post-judgment hearing on several counts of alleged ineffective assistance of trial counsel.

On Aug. 26, 2011, following a hearing, the circuit court rendered a decision in which it conceded that Mable K. was denied her right to counsel when the court precluded Mable K.'s lawyer from offering evidence regarding default. The court stated that it "should have been allowed to present contrary evidence at that time as to the grounds for default."

The circuit court ruled that the remedy was not a new fact-finding hearing, as requested by Mable K., but rather returning the case to an earlier stage of testimony to be held in the presence of the court instead of a jury. The court then vacated the TPR orders in her oral ruling although the ensuing written order did not vacate the termination orders.

Mable K. objected to this ruling, arguing that the circuit court's refusal to grant her an entirely new fact-finding hearing would shift the burden of persuasion onto her and that it was also fundamentally unfair. She maintains she should be afforded a new trial.

The dispute continued with filings by each side in both the circuit court and Court of Appeals, arguing over the proper court and process for the case to be heard. The Court of Appeals decided that neither side was entitled to appeal as a matter of right and dismissed the appeals.

Mable K. contends, in part, that the result of returning the case to an earlier stage is that she must argue that a default judgment is improper "to a judge who has already denied [her] the right to counsel and has also determined that Mable K. has failed to prove prejudice." Thus, Mable K. contends that fundamental fairness requires an entirely new fact-finding hearing.

Mable K. contends that it is impossible to restore her to the position she was in prior to the denial of the right to counsel. She explains: "The jury is gone, counsel no longer represents Mable K., and the witnesses are long gone…"

The county contends that there are no final orders at this point in this case because the trial court vacated the TPR orders. The county challenges the fundamental fairness arguments, particularly related to Mable K.'s right to counsel, noting that the right to counsel in TPR proceedings is a statutory right – not based on the Sixth Amendment. See Wis. Stat. § 48.23(2); In re Brianca M.W., 299 Wis.2d 637, ¶33, 728 N.W.2d 652 (2007).

A decision by the Supreme Court could clarify the proper mechanism in the event a party to a TPR proceeding receives an adverse ruling on remand.